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IN THE COURT OF APPEALS OF INDIANA

CALVIN T. BROWN,
Appellant-Defendant,
vs.
STATE OF INDIANA,
Appellee-Plaintiff.

No. 84A04-0711-CR-644

APPEAL FROM THE VIGO SUPERIOR COURT
The Honorable David R. Bolk, Judge
Cause No.84D03-0608-FB-2468

May 23, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Following a jury trial, Calvin Brown appeals his conviction of dealing cocaine, a Class B felony and his aggregate sentence of fourteen years. Brown raises five issues, which we restate as follows:

1. Whether the trial court improperly allowed the State to file amended charging informations four days prior to Brown's trial;

2. Whether the trial court abused its discretion in admitting a video into evidence;

3. Whether Brown was denied his right to confront the witnesses against him;

4. Whether Brown's conviction is supported by sufficient evidence; and

5. Whether the trial court improperly sentenced Brown.

Concluding that the trial court properly allowed the state to filed the amended informations, admitted the video, and sentenced Brown, that Brown was not denied his right to confront the witnesses against him, and that his conviction was supported by sufficient evidence, we affirm. However, we remand with instructions to the trial court that it correct its sentencing order to indicate that the determination that Brown is an habitual substance offender is not an offense in itself, but is merely an enhancement to his sentence for dealing cocaine.

Facts and Procedural History

On June 29, 2006, a confidential informant (the "C.I.") called Officer Denzil Lewis, of the Vigo County Drug Task Force, and told him that the C.I. could purchase cocaine from Brown. Officer Lewis met the C.I., who called Brown and told him that he wanted to purchase an eight ball of crack cocaine. Officer Lewis recorded this

conversation, in which Brown agreed to meet the C.I. Officer Lewis strip-searched the C.I. and found no money or drugs, placed an audio/video device (the "Hawk") on the C.I.'s chest, and gave the C.I. $150 in buy money. The C.I. then met Brown on a street corner, as arranged in their phone conversation, and the two went to a nearby apartment. Officer Lewis maintained visual surveillance of the C.I. until he met with Brown. Roughly six minutes later, the C.I. met Officer Lewis and gave him a bag containing, what later testing determined to be, 2.38 grams of cocaine. Officer Lewis searched the C.I. and found no money or other drugs.

On August 10, 2006, the State charged Brown with dealing cocaine, a Class B felony, and alleged that he was an habitual substance offender. On September 7, 2007, the State filed amended charging informations; the amended information regarding dealing cocaine is identical to the first information and the amended information regarding the habitual substance offender enhancement identifies the same cause numbers and offenses as the original information, but lists different conviction dates.

On September 11, 2007, the trial court held a jury trial, at which the State introduced the recorded phone conversation, the video recorded by the Hawk, and the testimony of Officer Lewis. The jury found Brown guilty of dealing cocaine. Both sides then presented evidence on the habitual substance offender count, and the jury subsequently returned a finding that Brown was an habitual substance offender. On October 12, 2007, the trial court held a sentencing hearing and sentenced Brown to eleven years for dealing cocaine, enhanced by three years because of Brown's habitual substance offender status. Brown now appeals his conviction and sentence.

Discussion and Decision

I. Amended Charging Informations[1]

Initially, we note that Brown did not object to the State's filing amended charging informations. Under these circumstances, Brown can prevail on this claim only by showing fundamental error. See Absher v. State, 866 N.E.2d 350, 354 (Ind. Ct. App. 2007). To do so, Brown must show that "the charging information . . . so prejudiced [his] rights that a fair trial was impossible." Id. at 355. Here, the only changes made in the amended informations were to the dates of Brown's prior convictions used to establish his habitual substance offender status. Every other piece of information used to identify the prior offenses, including the cause numbers, remained unchanged. Brown has completely failed to explain how allowing the State to make these changes rendered his trial unfair. Therefore, he has failed to demonstrate fundamental error. See id. at 356 (declining to find fundamental error where the defendant "does not assert that the charging information prevented him from knowing the nature of the charges against him, nor does he demonstrate how the charging information so prejudiced his rights that a fair trial was impossible").

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[1] Brown also argues that the charging information regarding the habitual substance offender enhancement does not include a citation to the habitual substance offender statute. Brown cites to Indiana Code section 35-34-1-2(a)(3), which requires an information to "cit[e] the statutory provision alleged to have been violated," but apparently overlooks the remainder of the sentence, which indicates "that any failure to include such a citation or any error in such citation does not constitute grounds for reversal of a conviction where the defendant was not otherwise misled as to the nature of the charges against the defendant." See also Gordon v. State, 645 N.E.2d 25, 27 (Ind. Ct. App. 1995) ("Errors in information are fatal only if they mislead the defendant or fail to give him notice of the charge filed against him."), trans. denied. Brown clearly had notice of the nature of the habitual substance offender allegation, and has not argued that he was misled in any way. Therefore, the State's failure to include the statutory citation is harmless error.

Although Brown's argument regarding the charging information may be rejected based on these grounds, we note our preference to decide matters on their merits without invoking waiver, e.g., Collins v. State, 639 N.E.2d 653, 655 n.3 (Ind. Ct. App. 1994), trans. denied, and will therefore briefly explain why Brown could not prevail even under a lesser standard.

Under the version of Indiana Code section 35-34-1-5 in effect at the time Brown committed his offense:[2]

> Subsection 5(b) presently prohibits any amendment as to matters of substance unless made thirty days before the omnibus date for felonies and fifteen days before the omnibus date for misdemeanors. The statutory prerequisite requiring that an amendment not prejudice the substantial rights of the defendant applies only to amendments of certain immaterial defects under subsection 5(a)(9), and to amendments related to a defect, imperfection, or omission in form as provided in subsection 5(c).

Fajardo v. State, 859 N.E.2d 1201 (Ind. 2007), superceded by the current version of Ind. Code § 35-34-1-5. As stated above, the only amendments made were to the dates on which Brown was convicted of his previous offenses. We conclude that these changes

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[2] The Indiana General Assembly subsequently amended Indiana Code § 35-34-1-5 so that the State may amend an information at any time prior to trial as to either form or substance, as long as the amendment does not prejudice the defendant's substantial rights. See Jewell v. State, 877 N.E.2d 864, 875 n.14 (Ind. Ct. App. 2007). Brown committed his offenses prior to this amendment, but was tried after the amendment took effect. This court had not been required to review fully which version applies in this situation, but dicta indicates a possible split on this court. Compare State v. O'Grady, 876 N.E.2d 763, 765 n.1 (Ind. Ct. App. 2007) ("Because the alleged offense here occurred before the legislature amended the statute, our review is based on the old statute.") and Roush v. State, 875 N.E.2d 801, 806 n.2 (Ind. Ct. App. 2007) (same) with Laney v. State, 868 N.E.2d 561, 565 n.1 (Ind. Ct. App. 2007) ("Obviously, we address the version of the statute in effect at the time of [the defendant's] trial."), trans. denied; and Fuller v. State, 875 N.E.2d 326, 330 n.2 (Ind. Ct. App. 2007) ("We address the version of the statute in effect at the time of [the defendant's] trial."), trans. denied. However, we need not address this split, as the result in this case would be the same under either version of the statute. Cf. Primmer v. State, 857 N.E.2d 11, 16 (Ind. Ct. App. 2006) (declining to determine the retroactivity of amendments to Indiana's sentencing statutes where the result in that case would be the same under either version), trans. denied.

were related to a defect, imperfection, or omission in form and were therefore permissible at any time as they did not affect Brown's substantial rights. See McCollum v. State, 582 N.E.2d 804, 814 (Ind. 1991) (citing Ind. Code § 35-34-1-5(c) and holding that the trial court properly permitted the State to amend the date of a previous conviction in an habitual offender information on the day of trial); cf. Gregory v. State, 524 N.E.2d 275, 279 (Ind. 1988) (affirming habitual offender determination where information contained erroneous dates and where there was no indication that the defendant "was in any way misled or hampered in his defense of the action by reason of the erroneous dates"); Harmon v. State, 518 N.E.2d 797 (Ind. 1988) (affirming determination of defendant's habitual offender status where information alleged defendant was convicted of prior offense on October 30, 1980, but evidence by the State showed that the defendant pled guilty to the prior offense on September 15, 1980).

Brown also argues that the amendments were improper because it appears that the State did not file a motion to amend along with the amended informations. Technically, the State should have filed a motion to amend along with the amended informations. See Ind. Code § 35-34-1-5. However, as our supreme court has previously recognized, where a defendant "is given reasonable notice of the charge of habitual offender and an opportunity to be heard on that claim, there is no prejudicial error shown from technical irregularities." Adams v. State, 539 N.E.2d 471, 472 (Ind. 1989). Our supreme court has also found, in a situation where the State failed to file a motion to amend an information, that "[t]he State implicitly moved to add the habitual offender count when it filed the amended information." Murphy v. State, 499 N.E.2d 1077, 1083 (Ind. 1986). Similarly,

we find no reversible error in the State's failure to file a motion along with the amended information. Cf. Nash v. State, 545 N.E.2d 566, 567 (Ind. 1989) (holding that reversal was not required where "the lack of that formal motion to amend did no prejudice to substantial rights").

Brown also argues that reversal is required based on the trial court's failure to arraign him on the amended informations. However, "[w]hile arraignment is the appropriate procedure for habitual offender charges, failure to arraign is not grounds for reversal absent any prejudice which results." Ashley v. State, 493 N.E.2d 768, 771 (Ind. 1986). As stated above, Brown clearly had notice of the allegations contained in the habitual substance offender information, and can point to no prejudice. See Logston v. State, 535 N.E.2d 525, 528 (Ind. 1989) (finding no prejudice to the defendant based on the lack of an arraignment on the habitual offender count, where this count had been on file for four months prior to trial); Ashley, 493 N.E.2d at 772 (finding no prejudice in the lack of an arraignment where the defendant had been aware of the habitual offender charge and had notice of the specific prior convictions). Therefore, the lack of a second arraignment is at most harmless error. See Tingle v. State, 632 N.E.2d 345, 355 (Ind. 1994) (holding no reversible error existed based on trial court's failure to arraign defendant on an amended information that left the defendant with "nothing new to prepare for"); cf. Lampkins v. State, 682 N.E.2d 1268, 1274 (Ind. 1997) ("The State should have properly arraigned defendant on the habitual offender charge but because we find that it did not result in prejudice to the defendant, that error was harmless."), modified on other grounds on reh'g, 685 N.E.2d 698.

II. Admission of Evidence[3]

A. Standard of Review

We review a trial court's decision to admit evidence for abuse of discretion. Collins v. State, 826 N.E.2d 671, 677 (Ind. Ct. App. 2005), trans. denied, cert. denied, 126 S.Ct. 1058 (2006). We will find that a trial court has abused its discretion when its decision is "clearly against the logic and effect of the facts and circumstances before it." Id. Even when we find that a trial court has abused its discretion by admitting evidence, we will not reverse unless the defendant's substantial rights have been affected. Ind. Evidence Rule 103(a); Pruitt v. State, 834 N.E.2d 90, 117 (Ind. 2005), cert. denied, 548 U.S. 910 (2006). In determining whether or not a party's substantial rights were affected

[3] Brown's argument regarding the admission of the videotape contains no citations to any sort of authority. Additionally, Brown uses phrases such as "[a]s we know," appellant's br. at 18, and "there is clearly insufficient evidence," id. at 21. Such expressions are no substitute for cogent reasoning supported by legal authorities. We admonish Brown's counsel to comply with Appellate Rule 46(A)(8)(a) ("The argument must contain the contentions of the appellant on the issues presented, supported by cogent reasoning. Each contention must be supported by citations to the authorities, statutes, and the Appendix or parts of the Record on Appeal relied on, in accordance with Rule 22."). Brown also failed to include the applicable standard of review for the remaining issues, and we admonish Brown to comply with Appellate Rule 46(A)(8)(b) ("The argument must include for each issue a concise statement of the applicable standard of review.").

We also note that this is not the first time this court has found it necessary to admonish Brown's counsel to comply with important appellate rules. See Kelly v. State, 2008 WL 1834114 (Ind. Ct. App. April 23, 2008) (unpublished opinion) (indicating the brief's lack of cogent argument and citation to the authority); Bell v. State, 880 N.E.2d 342 (Ind. Ct. App. 2008) (unpublished opinion) (admonishing counsel "to refrain from so mischaracterizing the record"); Porter v. State, 866 N.E.2d 879 (Ind. Ct. App. 2007) (unpublished opinion) (holding argument waived based on counsel's lack of compliance with Appellate Rule 46(A)(8)(a)); Butrum v. Roman, 806 N.E.2d 66 (Ind. Ct. App. 2004) (striking entire brief pursuant to Appellate Rule 42), trans. denied. We would be within our discretion to deem this issue waived. See Davis v. State, 835 N.E.2d 1102, 1113 (Ind. Ct. App. 2005) ("A party waives an issue where the party fails to develop a cogent argument or provide adequate citation to authority . . . ."), trans. denied. Although we decide to address this issue, see Collins, 639 N.E.2d at 655 n.3, we urge counsel to heed this court's admonishments and comply with our appellate rules in future briefs to this court.

by the erroneous admission of evidence, we "assess the probable impact of that evidence upon the jury." Corbett v. State, 764 N.E.2d 622, 628 (Ind. 2002).

B. Admission of the Video Evidence

Initially, we note that Brown did not object to the admission of the video at trial. Therefore, he has waived any error relating to its admission. See Tate v. State, 835 N.E.2d 499, 505 (Ind. Ct. App. 2005) ("[F]or us to review the admission of such evidence, a specific and timely objection must be made to preserve the error for review."), trans. denied. A defendant may still challenge the admission of evidence by claiming the admission amounted to fundamental error[4] – a "blatant violation of basic principles rendering the trial unfair and depriving the defendant of fundamental due process." Id. We will find fundamental error "only when the record reveals clearly blatant violations of basic and elementary principles of due process, and harm or potential for harm cannot be denied." Benson v. State, 762 N.E.2d 748, 755 (Ind. 2002) (quoting Warriner v. State, 435 N.E.2d 562, 563 (Ind. 1982)).

Brown's assertion that in order to introduce the video, the State must have called the C.I. to testify that the video accurately represented what occurred is patently incorrect.[5] Instead, the law is clear that pursuant to the "silent witness" theory, "videotapes may be admitted as substantive evidence, but 'there must be a strong showing of [the videotape's] authenticity and competency.'" McHenry v. State, 820

[4] Brown makes no argument regarding fundamental error. However, based on our preference for deciding issues on their merits, as stated above, we will address Brown's claim.

[5] We reiterate that Brown has cited no authority for this proposition.

N.E.2d 124, 128 (Ind. 2005) (quoting Edwards v. State, 762 N.E.2d 128, 136 (Ind. Ct. App. 2002), trans. denied). In addition, there must be a showing that the videotape has not been altered. See Edwards, 762 N.E.2d at 136; Bergner v. State, 397 N.E.2d 1012, 1017 (Ind. Ct. App. 1979) (discussing photographs). "In cases involving photographs [or videos[6]] taken by automatic cameras . . . there should be evidence as to how and when the camera was loaded, how frequently the camera was activated, when the photographs were taken, and the processing and chain of custody of the film after its removal from the camera." Kindred v. State, 524 N.E.2d 279, 298 (Ind. 1988) (quoting Beringer, 397 N.E.2d at 1017). In regard to this last requirement, "the State is not required to exclude every reasonable possibility of tampering, but rather must only provide reasonable assurance that an exhibit has passed through various hands in an undisturbed condition." Id. at 298-99.

Here, Officer Lewis testified regarding the nature of the Hawk, that he personally prepared the Hawk for recording, that he personally took the Hawk and downloaded the video on to his computer and copied the video onto the CD introduced into evidence, that the video contained on the CD was consistent with what he knew to have taken place, and that he had no reason to believe that the CD had been altered or tampered with in any way. We conclude that the State laid a proper foundation for the admission of the video evidence. See Kindred, 524 N.E.2d at 298-99.

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[6] The rules regarding the admission of photographs as substantive evidence also apply to the admission of video evidence. See Brown, 577 N.E.2d at 230.

Brown also takes issue as to the quality of the videotape. In order to be admissible, video evidence must be "of such clarity as to be intelligible and enlightening to the jury." Smith v. State, 272 Ind. 328, 331, 397 N.E.2d 959, 962 (1979) (quoting Lamar v. State, 258 Ind. 504, 513, 282 N.E.2d 795, 800 (1972)). We acknowledge that the video is not of perfect quality. However, we do not "require uniform perfection throughout a recording; rather the focus is upon whether the recording taken as a whole, or a crucial segment thereof, is of such poor quality that it is likely to lead to jury speculation as to its contents." Id. at 272 Ind. 331, 282 N.E.2d at 962-63. Having viewed the video, see Brown, 577 N.E.2d at 231, we conclude that the video's quality easily renders it admissible. Indeed, the quality of this video is substantially higher than that typically produced by a surveillance camera.

Having reviewed the record, we find no error, much less fundamental error, in the admission of the video evidence.

III. Confrontation Clause

Brown argues that his right to confront witnesses under the Indiana Constitution, Article 1, section 13, was violated by the admission of the video evidence and the State's failure to call the C.I. as a witness. Whether the admission of evidence violated a defendant's right to confront witnesses is a question of law that we review de novo. See United States v. Nettles, 476 F.3d 508, 517 (7th Cir. 2007) ("We review de novo a district court ruling that affects a defendant's Sixth Amendment rights."); cf. United States v. Saunders, 166 F.3d 907, 918 (7th Cir. 1999) ("Whether the limitations on cross-examination are so severe as to amount to a violation of the Confrontation Clause is a

question of law that we review de novo."); Fowler v. State, 829 N.E.2d 459, 465 (Ind. 2005), cert. denied, 547 U.S. 1193 (2006) ("Whether a witness is unavailable for purposes of the Confrontation Clause is a question of law.").

Again, Brown failed to raise this argument at trial and has therefore waived the issue. See C.C. v. State, 826 N.E.2d 106, 110 (Ind. Ct. App. 2005), trans. denied. However, waiver aside, we conclude that the admission of the video did not violate the confrontation clause. The Confrontation Clause bars "admission of testimonial statements of a witness who [does] not appear at trial unless he [is] unavailable to testify, and the defendant had had a prior opportunity for cross-examination." Crawford v. Washington, 541 U.S. 36, 53-54 (2004). This right to confront witnesses applies only to evidence that is "testimonial." Davis v. Washington, 547 U.S. 813, 821 (2006). Thus, "evidence that is nontestimonial 'is not subject to the Confrontation Clause.'" United States v. Ellis, 460 F.3d 920, 923 (7th Cir. 2006). Further, the Confrontation Clause does not apply to statements admitted for reasons other than proving the truth of the matter asserted. See Crawford, 541 U.S. at 59 n.9 ("The Clause does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.").

The portions of the video depicting Brown's own words and actions cannot violate the confrontation clause, as Brown has no right to confront himself. See Johnson v. State, 832 N.E.2d 985, 999 (Ind. Ct. App. 2005) (holding admission of letters written by the defendant could not violate the confrontation clause, as the defendant "does not have a right to confront himself"), trans. denied; Klagiss v. State, 585 N.E.2d 674, 681 (Ind.

Ct. App. 1992) ("The confrontation clause does not bar the admission of the statement of a defendant, his co-conspirators, or his agents."), trans. denied, cert. denied, 506 U.S. 819. Further, the Confrontation Clause applies only to hearsay, and Brown's statements that were admitted for the truth of the matter asserted were admissions by a party—not hearsay by definition—and were therefore not covered by the Confrontation Clause. See United States v. Tolliver, 454 F.3d 660, 665 (7th Cir. 2006) (noting that statements by the defendant on a recording "constitute admissions by a party-opponent, and, as such, those statements are, by definition, not hearsay under Federal Rule of Evidence 801(d)(2)(A)"), cert. denied, 127 S.Ct. 1019 (2007).[7]

The statements made by the C.I. on the tape also do not violate the Confrontation Clause. First, the statements made by the C.I. on the video were not introduced for the truth of the matter asserted, but instead merely provide context for Brown's statements and actions. Therefore, the admission of these statements does not violate the confrontation clause. See Tolliver, 454 at 666 (recognizing that the confidential informant's statements on recording "were admissible to put [the defendant's] admissions on the tapes in context," and that "[s]tatements providing context for other admissible statements are not hearsay . . . [and] the admission of such context evidence does not offend the Confrontation Clause"); United States v. Faulkner, 439 F.3d 1221, 1226-27 (10th Cir. 2006) (admission of recorded conversation between defendant and co-conspirators did not violate the confrontation clause, as co-conspirators' statements were

[7] Indiana Evidence Rule 801(d)(2)(A) is identical to its federal counterpart in all material respects.

not admitted for the truth of the matter asserted); State v. Snow, 144 P.3d 729, 738 (Kan. 2006) (holding the defendant's inability to cross-examine a bail bondsman whose statements were contained in a recording played to the jury did not violate the Confrontation Clause, as the "bondsman's statements were included to provide context to [the defendant's] statements but were not admitted to provide the truth of the matter asserted"); cf. Curry v. State, 228 S.W.3d 292, 299 (Tex. Ct. App. 2007) (holding that informant's statements on recording were not "testimonial"), pet. for review refused.

Brown can not complain that the State did not call the C.I. to testify at Brown's trial. "The State cannot be compelled to call witnesses at the instance of the accused." Jenkins v. State, 627 N.E.2d 789, 793 (Ind. 1993), cert. denied, 513 U.S. 812 (1994). The defendant "has the burden of seeing that witnesses who may have aided his defense are called." Id. Moreover, Brown has not stated anywhere that he was somehow prevented from calling the C.I. as a witness himself,[8] see Fowler, 829 N.E.2d at 465 ("[T]ools to compel attendance must be exhausted before a claim of violation of the Confrontation Clause will be entertained."), and has not indicated how any testimony elicited from this informant could have helped his case.

In sum, we conclude that admission of the video evidence, along with the absence of the C.I. from trial, did not violate Brown's right to confront the witnesses against him.

[8] We note that Brown identified the C.I. by name at trial. Therefore, the rules regarding when the State may be compelled to reveal the identify of a confidential informant are not applicable to this case. See generally, Beverly v. State, 543 N.E.2d 1111, 1114 (Ind. 1989) (describing the defendant's burden to demonstrate that the "disclosure is relevant and helpful or is necessary for a fair trial").

IV. Sufficiency of the Evidence[9]

A. Standard of Review

When reviewing a claim of insufficient evidence, we will not reweigh evidence or judge witnesses' credibility. Grim v. State, 797 N.E.2d 825, 830 (Ind. Ct. App. 2003). We will consider only the evidence favorable to the judgment and the reasonable inferences drawn therefrom. Id. We will affirm a conviction if the lower court's finding is supported by substantial evidence of probative value. Id.

Our supreme court has recently summarized our standard of review when assessing claims of insufficient evidence.

> When reviewing the sufficiency of the evidence to support a conviction, appellate courts must consider only the probative evidence and reasonable inferences supporting the verdict. It is the fact-finder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider it most favorably to the trial court's ruling. Appellate courts affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. It is therefore not necessary that the evidence overcome every reasonable hypothesis of innocence. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict.

Drane v. State, 867 N.E.2d 144, 146-47 (Ind. 2007) (quotations and citations omitted) (emphasis in original).

[9] Brown neither cites to authorities nor sets out the applicable standard of review regarding this argument. See supra, note 3.

B. Evidence Supporting Brown's Conviction

In order to convict Brown of dealing cocaine, the State was required to introduce evidence that Brown knowingly or intentionally delivered cocaine. Ind. Code § 35-48-4-1(a). Here, the evidence against Brown included a recording of the phone call, in which the C.I. arranged to meet with Brown and told him that he wanted to buy cocaine; Officer Lewis's testimony that the C.I. was strip-searched before and after the transaction, had no drugs on him prior to meeting with Brown, and returned with drugs and without the buy money; Officer Lewis's testimony that he observed the C.I. until he met with Brown and observed the C.I. shortly after he exited the apartment; and the video showing the C.I. meeting with Brown and holding up a baggie containing a white substance immediately after entering an apartment with Brown.

A properly conducted controlled buy, which will support a conviction of dealing in a controlled substance, is described as follows:

> A controlled buy consists of searching the person who is to act as the buyer, removing all personal effects, giving him money with which to make the purchase, and then sending him into the residence in question. Upon his return he is again searched for contraband. Except for what actually transpires within the residence, the entire transaction takes place under the direct observation of the police. They ascertain that the buyer goes directly to the residence and returns directly, and they closely watch all entrances to the residence throughout the transaction.

Watson v. State, 839 N.E.2d 1291, 1293 (Ind. Ct. App. 2005) (quoting Mills v. State, 177 Ind. App. 432, 435, 379 N.E.2d 1023, 1026 (1978)).

We recognize officers in this case did not precisely follow this procedure, as they did not personally observe the C.I. the entire time before he entered the apartment.

However, the adequacy of the controls in such a buy "goes to the weight and credibility of the evidence presented rather than to the burden of proof." Hudson v. State, 462 N.E.2d 1077, 1083 (Ind. Ct. App. 1984); cf. Hale v. State, 875 N.E.2d 438, 445 (Ind. Ct. App. 2007) (holding sufficient evidence existed to sustain defendant's conviction based on testimony of police and informant regarding a controlled buy), trans. denied.

Also, the informant's actions were captured on the video, which clearly shows that the informant did not meet with anyone prior or subsequent to his meeting with Brown. We recognize that the video does not capture the hand-to-hand exchange, and that Officer Lewis did not actually witness the transaction. However, these factors were for the jury to consider when weighing the evidence. See Haynes v. State, 431 N.E.2d 83, 86 (Ind. 1982); Hudson, 462 N.E.2d at 1083. We conclude that the evidence presented at trial was sufficient to support an inference that Brown delivered cocaine to the C.I.

V. Sentencing

Initially, Brown points out that the Sentencing Order indicates that the trial court may have entered a judgment of conviction on the count alleging that Brown is an habitual substance offender. See Appellant's Br. at 24 ("The Court sentences Defendant to an executed term of imprisonment at the Indiana Department of Corrections (sic) of three (3) years as to the offense in Count 2: Habitual Substance Offender."). We agree with Brown that the determination that a defendant is an habitual substance offender is not a separate offense, but is merely a determination that is used as a sentence enhancement to the accompanying felony. Reffett v. State, 844 N.E.2d 1072, 1074 (Ind. Ct. App. 2006) ("A habitual offender finding does not constitute a separate crime nor

result in a separate sentence." (quoting Greer v. State, 680 N.E.2d 526, 527 (Ind. 1997)). Therefore, we remand with instructions that the trial court ensure that a judgment of conviction was entered only for dealing cocaine, and to correct the sentencing order to indicate that the habitual substance offender determination is not a separate offense.

Brown also argues that his sentence of eleven years for dealing cocaine, enhanced by three years because of his status as an habitual substance offender, violates Indiana Code section 35-50-2-1.3, which states:

> (b) Except as provided in subsection (c), a court is not required to use an advisory sentence.
> (c) In imposing:
>
> > (1) consecutive sentences for felony convictions that are not crimes of violence . . .
> > (2) an additional fixed term to an habitual offender under section 8 of this chapter; or
> > (3) an additional fixed term to a repeat sexual offender under section 14 of this chapter;
>
> a court is requires to use the appropriate advisory sentence in imposing a consecutive sentence or an additional fixed term. However, the court is not required to use the advisory sentence in imposing the sentence for the underlying offense.

Brown argues that the trial court was required to sentence him to the advisory sentence for a Class B felony, ten years, see Ind. Code § 35-50-2-5, instead of the eleven-year sentence it imposed. Brown's argument is without merit for two reasons. First, Brown was not found to be an habitual offender under Indiana Code section 35-50-2-8, or a repeat sexual offender under section 35-50-2-14; Brown was found to be an habitual substance offender under section 35-50-2-10. Therefore, the statute relied upon by Brown does not even apply to his situation. See State v. Willits, 773 N.E.2d 808, 813 (Ind. 2002) ("When certain items or words are specified or enumerated in a statute then,

by implication, other items or words not so specified or enumerated are excluded." (quoting Forte v. Connerwood Healthcare, Inc., 745 N.E.2d 796, 800 (Ind. 2001))). Further, Brown ignores the last part of section 35-50-2-1.3(c), which indicates that a court is not required to use the advisory sentence when sentencing a defendant for the underlying offense. Therefore, even if the statute did apply to Brown, the trial court would not have been required to sentence Brown to an advisory sentence for his dealing cocaine conviction.

Conclusion

We conclude the trial court did not improperly allow the State to file the amended charging informations. We also conclude the trial court properly admitted the video evidence and that this evidence did not violate Brown's rights to confront witnesses. Further, we conclude sufficient evidence supports Brown's conviction. Lastly, although we remand with instructions that the trial court correct its sentencing order, we conclude the trial court properly sentenced Brown.

Affirmed in part and remanded with instructions.

BAKER, C.J., and RILEY, J., concur.